

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 -

In the Matter of
Treated Wastewater Change Petition WW-VVWRA of
VICTOR VALLEY WASTEWATER RECLAMATION AUTHORITY

SOURCE: Mojave River

COUNTY: San Bernardino

**ORDER DENYING PETITION TO CHANGE POINT OF DISCHARGE,
PLACE OF USE, AND PURPOSE OF USE OF TREATED WASTEWATER**

1.0 INTRODUCTION

As a general rule, the State Water Resources Control Board (SWRCB) strongly supports the use of reclaimed water for nonpotable uses where reclaimed water is available in order to maximize the beneficial use of the state's scarce water supplies. This can occur when treated wastewater otherwise would not be used either because the quantity of available reclaimed water exceeds demand or because the wastewater is discharged to a surface or groundwater body of sufficiently poor quality as to make the water unfit for beneficial use. In the past, the SWRCB has required that reclaimed water be used instead of potable water for nonpotable uses, such as irrigation, pursuant to Water Code sections 13550 and 13551. (E.g., Decision 1625; see also Decision 1623-Amended; see also Order WQ 84-7 [requiring dischargers in water-short areas who propose to discharge treated wastewater to the ocean to evaluate the potential for water reclamation].) Water reclamation promotes the constitutional policy that the waters of the state be put to beneficial use to the maximum extent possible. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.)

Before requiring the use of reclaimed water or approving a wastewater change petition, however, the SWRCB must ensure that the reclaimed water project in question will not injure third party water right holders or unreasonably affect fish and wildlife. By this order, the SWRCB denies

Victor Valley Wastewater Reclamation Authority's (VWVRA) petition to change the point of discharge, place of use, and purpose of use of 1,680 acre-feet per annum (afa) of treated wastewater. The petition is denied because approval of the petition would injure third party water right holders and could adversely affect public trust resources.

VWVRA seeks to supply treated wastewater to the City of Victorville for irrigation of the city's Westwinds Golf Course, athletic fields, and other landscaping at the Southern California Logistics Airport (SCLA). Currently, VWVRA discharges most of the treated wastewater directly into the Mojave River. Flows in the Mojave River support both diversions for irrigation and municipal use and public trust uses, in a basin where existing demands substantially exceed supply. In practical effect, the water VWVRA proposes to reclaim is being reclaimed already. The treated wastewater that VWVRA discharges to the Mojave River is being put to full beneficial use by third party water right holders and the public trust resources of the Mojave River. To the extent that a water reclamation project, such as this one, involves a change in point of discharge that reduces the water available to other users, the effect is not to promote maximum beneficial use, but to take water away from the parties who are making beneficial use of the water in order to benefit different users. In short, the issue presented in this case is not whether reclaimed water should be put to nonpotable uses, but whether existing users of the reclaimed water who are entitled to protection will be injured by VWVRA's proposed transfer.

For the reasons explained below, we conclude that the transfer would injure all of the water right holders in the Alto Subarea of the Mojave River watershed who are bound by the Mojave River Adjudication and rely on VWVRA's treated wastewater discharge to maintain minimum flow requirements in the Mojave River. In addition, the transfer could adversely affect riparian habitat along the Mojave River, and a number of threatened and endangered species that rely on that habitat. Accordingly, VWVRA's petition is denied.

As discussed more fully below, however, we believe that it may be possible for VWVRA to implement future reclaimed water projects, provided that impacts to third party water right holders are offset by a reduction in groundwater pumping or the importation of water from

outside the watershed. In evaluating any such proposal, the SWRCB also would have to consider impacts to public trust resources.

2.0 FACTUAL AND PROCEDURAL BACKGROUND

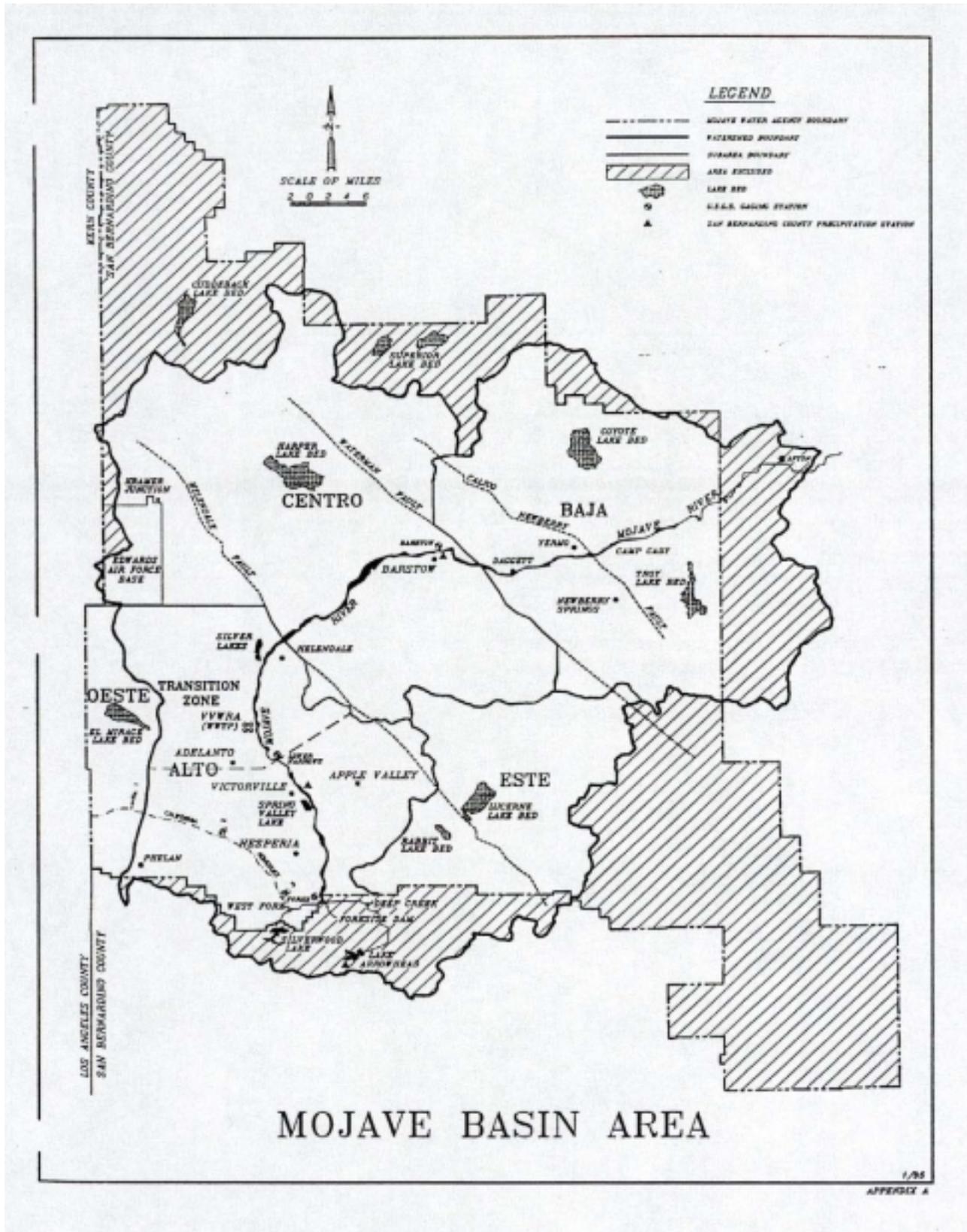
VVWRA is a joint powers authority whose constituent entities include the Cities of Apple Valley, Hesperia and Victorville, and San Bernardino County Service Areas 64 (Spring Valley Lake), and 42 (Oro Grande). VVWRA owns and operates the Victor Valley Wastewater Treatment Plant, which is located near the Mojave River north of the City of Victorville in San Bernardino County, California.

2.1 The Physical Setting

The Mojave River traverses the Mojave River Basin in a northeasterly direction for approximately 125 miles, from its headwaters in the San Bernardino Mountains, to its terminus in Soda Lake near Baker, California. The Mojave River Basin is divided into five hydrologically interconnected subareas: Oeste, Este, Alto, Centro, and Baja. The Alto Subarea is located upstream, in the southern region of the Mojave River Basin. The Oeste and Este Subareas flank the Alto Subarea on the west and east, respectively. The Helendale Fault separates the Alto Subarea from the Centro Subarea, which is located downstream and to the northeast of the Alto Subarea. The Waterman Fault separates the Centro Subarea from the Baja Subarea, which is downstream and to the northeast of the Centro Subarea. The Cities of Adelanto, Apple Valley, Hesperia, and Victorville are all located within the Alto Subarea. The City of Barstow is located within the Centro Subarea.

Roughly midway through the Alto Subarea, the Mojave River flows through an area called the Lower Narrows. The portion of the Alto Subarea located between the Lower Narrows and the Helendale Fault is called the transition zone. VVWRA's wastewater treatment plant and the SCLA are located within the transition zone. Figure 1 depicts the Mojave River Basin and the features described above.

FIGURE 1

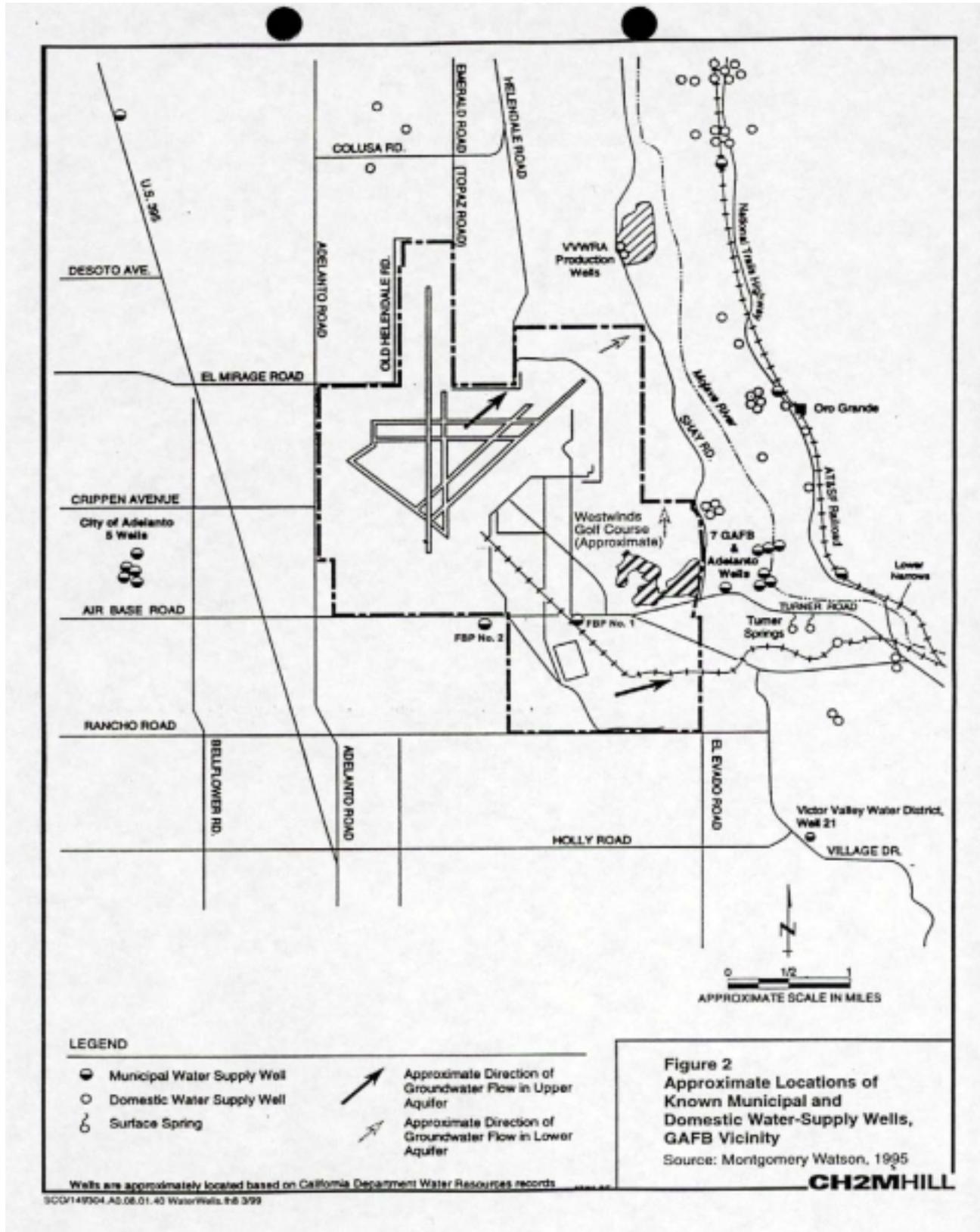


2.2 Project Description

As stated earlier, VVWRA seeks to cease discharging to the Mojave River up to 1,680 afa, or 1.5 million gallons per day (mgd), of treated wastewater and to instead transfer the water to the City of Victorville for irrigation at SCLA. The proposed place of use was formerly part of George Air Force Base, which was closed in 1992. (VVWRA 2a, p. 1.) The reclaimed water would be transported via 2.96 miles of pipeline to an existing pond, which would be lined and enlarged from an existing capacity of 0.25 million gallons (mg) to 1.0 mg. Currently, only the golf course is plumbed to allow for irrigation using reclaimed water. The City of Victorville plans to install dual plumbing to allow for other landscaped areas to be irrigated using reclaimed water.

Currently, the City of Victorville irrigates the Westwinds Golf Course using potable groundwater that the City of Adelanto supplies to the City of Victorville under contract. The other areas that VVWRA and the City of Victorville propose to irrigate with reclaimed water have not been irrigated since George Air Force Base closed in 1992. (R.T. pp. 402-403.) The City of Adelanto produces the water that is supplied to the golf course from seven wells located adjacent to the Mojave River east of the golf course. Figure 2, which is taken from VVWRA Exhibit 11, shows the location of VVWRA's wastewater treatment plant (in the vicinity of VVWRA's production wells), the golf course, and the City of Adelanto's wells.

FIGURE 2



Currently, VVWRA processes approximately 9,700 afa, or 8.63 mgd, of wastewater. VVWRA discharges most of the treated wastewater directly into the Mojave River. VVWRA operates its wastewater treatment plant under a National Pollutant Discharge Elimination System (NPDES) permit issued by the Lahontan Regional Water Quality Control Board (NPDES Permit No. CA0102822). The permit authorizes the treatment of a total of 9.5 mgd, 8.3 mgd of which may be discharged directly into the Mojave River. Any remaining treated wastewater must be discharged to percolation ponds adjacent to the plant. VVWRA plans to expand the capacity of the treatment plant from 9.5 mgd to 11 mgd to accommodate future development within its service area.

2.3 The Mojave River Adjudication

The SWRCB has declared the Mojave River System to be fully appropriated year-round. (Order WR 98-08, p. 23, ex. A, p. 43.) In addition, the Mojave River Basin is in a state of overdraft and as a consequence has been adjudicated. The adjudication began in 1990 when the City of Barstow and Southern California Water Company (SCWC) filed a complaint against the City of Adelanto, the Mojave Water Agency (MWA), and other upstream water users, alleging that upstream groundwater production was adversely affecting the plaintiffs' water supply. In response, MWA served a cross-complaint on the plaintiffs and all the major water users in the Mojave River Basin, over 1,000 parties, seeking a determination of most of the water rights in the Mojave River Basin. Subsequently, the parties to the litigation engaged in settlement negotiations and developed a physical solution to the overdraft problem.

Rather than requiring each party to reduce its water use in order to correct the overdraft, the physical solution imposes a replacement water assessment if a party exceeds its "free production allowance." Each party's free production allowance is based on the party's "base annual production," which in turn is based on the party's maximum water use during the period between 1986 and 1990, without regard to the priority of the party's water right.¹

¹ Under California law governing groundwater rights, overlying users, who pump water for use on their own lands overlying a groundwater aquifer, have priority over appropriators, who pump water for use on lands that do not lie over the aquifer, or for use by persons other than the water right holder. (*California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725 [37 Cal.Rptr. 1, 6-7].) Generally, irrigators are overlying users, while cities, water districts, and water companies who supply water for municipal or industrial use are appropriators.

In order to protect downstream rights, the physical solution also requires each subarea to provide a certain amount of water to the subarea downstream. The parties within the Alto Subarea are required to provide an average of 23,000 afa of “base” and subsurface flow, as measured at the Lower Narrows, to the Centro Subarea. Base flow is defined as the surface flow in the Mojave River that remains after subtracting storm flows. The subsurface flow is deemed to be 2,000 afa. Although VVWRA is not a party to the adjudication,² any treated wastewater that VVWRA discharges into the Mojave River in the transition zone is credited towards the Alto Subarea obligation.³

If the Alto Subarea does not meet its obligation to the Centro Subarea, the Alto Subarea incurs a make-up water obligation and the parties within the Alto Subarea must pay a make-up water assessment. Both replacement water assessments, incurred by individual users, and make-up water assessments, incurred by the users in a subarea collectively, are used to acquire “supplemental water.” Supplemental water includes imported water that may be purchased from the State Water Project. Supplemental water also includes any party’s unused free production allowance that is purchased in order to satisfy a subarea’s make-up water obligation. (VVWRA 1j, p. 13.)

Most of the parties to the litigation stipulated to the physical solution and the Riverside County Superior Court entered a judgment imposing the physical solution on the stipulating parties. After a trial, the trial court imposed the physical solution on the nonstipulating parties. Certain alfalfa and dairy farmers who had not stipulated to the physical solution, known as the Cardozo appellants, appealed the trial court judgment. The Cardozo appellants asserted that the judgment was invalid because the physical solution did not recognize the priority of the Cardozo appellants’ claimed overlying water rights.

² MWA named VVWRA as a party to the adjudication because VVWRA was contributing to the flow in the Mojave River. MWA dismissed VVWRA, however, in response to VVWRA’s argument that VVWRA was adding water to the system, not taking it out. (R.T. pp. 742-743.) Although VVWRA is not a party to the adjudication, all of VVWRA’s constituent members are parties. (VVWRA 1j, ex. B.)

³ The judgment allows water “other than Base Flow, Subsurface Flow or Storm Flow that is conveyed and discharged across a boundary between Subareas” to be credited toward the pertinent Subarea Obligation. (VVWRA 1j, ex. G, p. 3; see also AVRWC 1, p. 3.)

The case ultimately reached the California Supreme Court. The Court agreed with the Cardozo appellants that a groundwater adjudication must take into account water right priorities and affirmed the reversal of the trial court judgment against the Cardozo appellants. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1233 [5 P.3d 853, 99 Cal.Rptr.2d 294].) The Court held, however, that the trial court judgment could still be applied as against those parties who had stipulated to it. (*Id.* at pp. 1252, 1256.) The Court expressly stated that its decision did not limit the authority of the SWRCB. (*Id.* at p. 1233, fn. 2.)

2.4 Events Leading up to the SWRCB's Hearing on VVWRA's Petition

The SWRCB issued notice of VVWRA's change petition on April 9, 1999. Nine parties filed protests: Baldy Mesa Water District, Newton T. Bass Trust, California Department of Fish and Game (DFG), Jess Ranch Water Company (Jess Ranch), Kemper Campbell Ranch, James L. and Naomi Rossi, Silver Lakes Association, Gary Thrasher, and Joseph Vail. VVWRA filed answers to the protests. (SWRCB Staff 1, File WW-VVWRA.)

On February 24, 2000, VVWRA entered into a memorandum of understanding (MOU) with DFG. Pursuant to the MOU, DFG agreed to dismiss its protest subject to certain conditions and VVWRA agreed to continue to discharge not less than 8,500 afa and not less than 18 acre-feet per day into the Mojave River, subject to conditions. VVWRA's commitment to maintain the specified discharge levels was based on VVWRA's anticipation that the proposed 1,680 afa transfer would be phased in over a period of ten years and offset by increased discharges associated with increased deliveries of wastewater to VVWRA's treatment plant.

VVWRA wrote to the other remaining protestants, informing them of the terms of the MOU with DFG and inquiring whether they would dismiss their protests in light of the MOU. James L. and Naomi Rossi and Silver Lakes Association agreed to dismiss their protests. On October 6, 2000, the SWRCB issued notice of a public hearing on VVWRA's petition. By letter dated October 13, 2000, VVWRA informed DFG that it elected to terminate the MOU in view of the fact that the matter had been set for hearing.

In addition to VVWRA, five parties filed timely Notices of Intent to Appear at the hearing before the SWRCB: Apple Valley Ranchos Water Company (AVRWC), DFG, Jess Ranch, SCWC, and

U.S. Fish and Wildlife Service. Subsequently, VVWRA requested that the SWRCB dismiss the protests of those parties who had not filed a Notice of Intent to Appear. Only Joseph Vail responded to VVWRA's request and filed a late Notice of Intent to Appear.

By letter dated November 2, 2000, Hearing Officer Arthur G. Baggett, Jr. ruled on VVWRA's request and dismissed the protests of the following parties for failure to submit a Notice of Intent to Appear: Baldy Mesa Water District, Newton T. Bass Trust, Kemper Campbell Ranch, James and Naomi Rossi, Silver Lakes Association, and Gary Thrasher.⁴

Hearing Officer Baggett also ruled on VVWRA's objection to the presentation of evidence by AVRWC and SCWC on the grounds that they were not protestants. Hearing Officer Baggett overruled VVWRA's objection on the basis that filing a protest was not a prerequisite to participating in the hearing and AVRWC and SCWC had fully complied with the procedural requirements for participation in the hearing.

The SWRCB held four days of hearing on December 5 and 6, 2000, and January 17 and 18, 2001. VVWRA, AVRWC, DFG, Jess Ranch, and SCWC presented evidence and participated in the hearing. Joseph Vail participated in the hearing but did not present evidence. The following parties presented policy statements: Town of Apple Valley; Jack Beinschroth; Rodolfo Cabriales, Vice Chair of the VVWRA Board of Commissioners and Councilmember of the City of Victorville; California Association of Sanitation Agencies; San Bernardino County Service Areas 64 and 42; U.S. Fish and Wildlife Service; and WaterReuse Association.

3.0 LEGAL BACKGROUND

VVWRA filed its petition under Water Code section 1211. That section requires SWRCB approval prior to making any change in the point of discharge, place of use, or purpose of use of treated wastewater. Section 1211 requires the SWRCB to "review such changes pursuant to the provisions of Chapter 10 . . ." of the Water Code (sections 1700-1707). Chapter 10 governs changes in the point of diversion, place of use, or purpose of use of appropriative water rights.

⁴ MWA had submitted a comment letter and subsequently clarified that it did not intend for its letter to be construed as a protest. Accordingly, Hearing Officer Baggett did not grant VVWRA's request to dismiss MWA's "protest."

Essentially, Water Code section 1211 requires the SWRCB to review a proposed change in point of discharge, place of use, or purpose of use of treated wastewater in the same manner as the SWRCB would review a proposed change to an appropriative water right.

Water Code section 1702 provides that before granting permission to make a change, the SWRCB must find “that the change will not operate to the injury of any legal user of the water involved.” The statutory “no injury” rule set forth in Water Code section 1702 codifies the common law no injury rule and therefore should be interpreted consistent with case law that interprets and applies the common law rule. (SWRCB Order WR 98-01, p. 5; SWRCB Order WR 99-012, p. 12.)

Water Code section 1210 provides that the owner of a wastewater treatment plant has the exclusive right to treated wastewater as against anyone who has supplied the water to the treatment plant, except as otherwise provided by agreement. But section 1210 expressly provides that this provision does not affect the treatment plant owner’s obligations to any legal user of the discharged treated wastewater.

The purpose of Water Code section 1210 was to encourage water reclamation by clarifying an ambiguity regarding ownership of treated wastewater as between a treatment plant owner and suppliers of the wastewater. As both sections 1210 and 1211 make clear, however, the Legislature did not intend to affect any rights that downstream users may have to the treated wastewater discharge under the common law.

Sections 1210 and 1211 were enacted upon the recommendation of the Governor’s Commission to Review California Water Rights Law. The language of sections 1210 and 1211 comes from proposed legislation contained in the Commission’s Final Report. (Final Report, Governor’s Commission to Review California Water Rights Law (December, 1978) pp. 85-86.)⁵ In the Final Report, the Commission reasoned that concentrating ownership in the treatment plant owner, rather than in multiple suppliers of the wastewater, would encourage

⁵ We take official notice of this report, along with another Commission publication entitled Staff Paper No. 3, Legal Aspects of Water Conservation in California, Background and Issues (August 1977). Official notice is taken pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the SWRCB to take official notice of matters that may be judicially noticed), and pursuant to Evidence Code section 452, subdivision (c) (authorizing judicial notice of the official acts of the legislative, executive, and judicial branches of the State).

reclamation. (*Id.* at pp. 63-64.) The Commission recognized, however, that case law addressed the question whether downstream users may have a paramount right to the treated wastewater discharge. The Commission stated:

“The subsequent reuse of reclaimed water raises a different set of ownership issues. Commonly, downstream users will have obtained rights to the return flow that upstream users have discharged into the stream. Generally, upstream dischargers must respect the rights of downstream users to the return flow.”

(*Id.* at p. 64.) After a brief summary of the common law no injury rule, the Commission concluded that: “[g]iven the substantial judicial consideration of downstream rights to return flow, . . . no additional action is necessarily [sic] to modify existing law.” (*Id.* at p. 65.)

Generally, the common law no injury rule precludes a change in the exercise of a water right if, among other things, the change would alter the pattern or rate of return flow to the detriment of downstream water right holders. (*Scott v. Fruit Growers’ Supply Co.* (1927) 202 Cal. 47, 52-53, 55 [258 P. 1095, 1097-1098].) Return flow is water that flows back into a stream, lake, or other body of water after it has been appropriated and used.

An important limitation to the no injury rule is that downstream water right holders are protected from injury only to the extent that the source of the return flow is native water. Native water is water that under natural conditions would contribute to a given stream or other body of water. (1 Slater, *California Water Law and Policy* (2000) p. 7-4.) When the source of return flow to a stream is native water, the return flow is considered part of the natural flow of the stream to which riparian and appropriative water rights may attach.

The no injury rule does not protect downstream water right holders when the source of the return flow is “foreign water.” Foreign water is water that would not be present in a given water body under natural conditions. The most common example of foreign water is water that has been imported from outside the watershed. Riparian right holders have no right to use return flow from foreign water because riparian rights extend only to the natural flow of the stream. (*Bloss v. Rahilly* (1940) 16 Cal.2d 70, 74-76 [140 P.2d 1049, 1051-1052].)

An appropriative water right to use return flow from foreign water may be perfected. (Water Code section 1202, subdivision (d) expressly provides that return flow is subject to appropriation under the statutory appropriation procedures set forth in the Water Code.) Such a right is contingent, however, on the continued importation of the foreign water and abandonment of the return flow. The appropriative right holder cannot compel the continued importation of foreign water, or claim injury if the importer opts to reclaim or recapture the return flow or sell it to another user. (*Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 348-353 [90 P.2d 58, 61-63]; *City of Los Angeles v. City of Fernando* (1975) 14 Cal.3d 199, 259-261 [537 P.2d 1250, 1293-1295, 123 Cal.Rptr. 1, 44-46]; *Haun v. DeVours* (1950) 97 Cal.App.2d 841, 844 [218 P.2d 996, 998].)⁶

In addition to surface water imported from outside the watershed, percolating groundwater that is extracted from the ground and then added to a stream will also be treated as foreign if the groundwater is not in hydrologic continuity with the stream and would not reach the stream under natural conditions. (*Mayberry v. Alhambra Addition Water Co.* (1899) 125 Cal. 444, 449 [54 P. 530, 531].) Conversely, percolating groundwater should be treated as native water if under natural conditions the groundwater would reach or recharge the stream.

Consistent with Water Code sections 1211 and 1702 and the no injury rule, treated wastewater discharged into a given stream should be treated as return flow from native water if the source of the treated wastewater is surface water or percolating groundwater that under natural conditions would reach the stream. The SWRCB reached the same conclusion *In the Matter of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation District*, SWRCB Order WR 95-9. In the *El Dorado* case, like the instant case, the petitioner sought to transfer treated wastewater

⁶ The summary of the common law contained in the Governor's Commission's Final Report, discussed earlier, suggests that a second exception to the no injury rule exists where an upstream user releases return flow with the prior intent of recapturing the return flow. (Final Report, *supra*, at p. 64; see also Staff Paper No. 3, *supra*, at p. 56.) All of the cases cited for this proposition, however, involved the right of an upstream user to recapture return flow from foreign water. We are not aware of any authority for the proposition that an upstream user with the prior intent to recapture return flow from native water could do so to the injury of downstream right holders. To the contrary, the cases indicate that, where return flow comes from native water, downstream right holders are entitled to protection from changes that would impair the quantity or rate of return flow. (*Scott v. Fruit Growers' Supply Co.* (1927) 202 Cal. 47, 52-53, 55 [258 P. 1095, 1097-1098]; see also *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 595 [138 P. 751, 754-755].)

previously discharged into a stream to an off-site reclamation project. A number of downstream water right holders asserted that they would be injured by the proposed change.

The SWRCB explained that wastewater change petitions must be reviewed in accordance with the no injury rule and concluded that whether the downstream water right holders could claim injury depended on whether the source of the treated wastewater originated within the watershed or was foreign water. (*Id.* at pp. 15-22.) The SWRCB stated that downstream right holders might be able to claim injury to the extent that the source of the treated wastewater water was surface water from within the watershed, or groundwater from within the drainage of the stream that would under natural conditions flow into the stream. (*Id.* at p. 22.) In that case, however, the source of the majority of the treated wastewater was imported water from outside the watershed. Only 0.1 percent was attributable to groundwater within the drainage, which was less than the amount of water that would remain in the stream under the terms of the SWRCB's order. (*Ibid.*)

Accordingly, the SWRCB concluded that the downstream water right holders would not be injured by the change. (*Id.* at p. 19.)⁷

In its closing brief, VVWRA argues that all treated wastewater should be treated as foreign water *per se* because both the constituents of the water and the timing of its return to the stream are altered by the treatment process. Alternatively, VVWRA argues that treated wastewater could be treated as abandoned personal property that the treatment plant owner may dispose of as it wishes. In support of the latter proposition, VVWRA cites to a law review article, Somach, *Who Owns Reclaimed Wastewater?* (1994) 25 Pac. L.J. 1087, 1101-1103, and cases cited therein. The law review article cites to several older cases holding that water becomes personal property once it is delivered to a municipal or industrial customer. (*Heyneman v. Blake* (1862) 19 Cal. 579; *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716 [93 P. 858]; *Lewis v. Scazighini* (1933) 130 Cal.App. 722 [20 P.2d 359].) The author concludes that because water rights are real property, the rules governing the exercise of water rights, including the no injury rule, do not apply to treated wastewater, which is abandoned personal property. (*Id.* at p. 1101.)

⁷ In the *El Dorado* case, the SWRCB stated that Order WR 95-9 was not to be considered precedential to the extent that it contained findings of fact based on the evidence in the record. (*Id.* at p. 14.) The aspects of Order 95-9 that inform our disposition of this case, however, are the legal conclusions, not the findings of fact.

Both of these arguments are inconsistent with Water Code sections 1211 and 1702, which, as stated earlier, require the SWRCB to find that a wastewater change petition will not operate to the injury of any legal user of the water involved. VVWRA's interpretation would render the SWRCB's review of wastewater change petitions meaningless and unnecessary. If all treated wastewater were foreign water *per se*, then the SWRCB would always be compelled to make a finding of no injury to any legal user and, presumably, to approve any wastewater change petition that is filed with the SWRCB. Similarly, the theory that all treated wastewater is abandoned personal property to which the no injury rule does not apply is inconsistent with the statutory requirement that the SWRCB make a finding of no injury.

To read all meaning out of the statutory requirement that the SWRCB review wastewater change petitions in accordance with the no injury rule codified in section 1702 violates a basic canon of statutory construction, which holds that, where possible, statutes are to be construed in a manner that gives significance to every word, phrase, and sentence. (*People v. Good* (1990) 217 Cal.App.3d 1533, 1538 [266 Cal.Rptr. 608, 610].)

In addition, it does not necessarily follow from the cases cited by VVWRA that the no injury rule is inapplicable once a municipal or industrial customer abandons return flow, which then percolates into the ground, returns to a surface water body, or is delivered to a wastewater treatment plant. This issue was not addressed in any of the cases cited by VVWRA. (See *City of Los Angeles v. City of San Fernando, supra*, 14 Cal.3d at p. 260 [the fact that water drawn from a tap becomes the personal property of residential, commercial, or industrial customer did not preclude an importer of a foreign water supply from recapturing return flow attributable to imported water, in accordance with the no injury rule].)

4.0 SOURCE OF THE WATER

The source of the water that is used within VVWRA's service area and treated by VVWRA is groundwater pumped within Alto Subarea that under natural conditions would reach the Mojave River. All of the witnesses whose testimony addressed the issue confirmed that the sole source of water delivered to VVWRA's wastewater treatment plant is groundwater pumped within the Alto Subarea. (VVWRA 1a, p. 4; VVWRA 4a, p.2; DFG 2, p. 1; R.T. pp. 35, 129 & 386.) Witnesses for VVWRA, DFG, and SCWC also agreed that groundwater within the

Alto Subarea and surface flow in Mojave River are in hydrologic continuity, and that under natural conditions groundwater discharges to the Mojave River in the vicinity of the Lower Narrows. (VWRA 4a, pp. 2-4; DFG 2, pp. 1-2; SCWC 1, pp. 8-10; R.T. pp. 64, 235, 387-388, 618, 702-703.)

The interrelationship between surface flow of the Mojave River and groundwater in the alluvial aquifers in the Alto Subarea is well documented by testimony and evidence in the record. Depending on local conditions, primarily groundwater elevation, the occurrence of surface flow in the river, and the characteristics of the materials comprising the streambed, groundwater may either discharge to the river or surface water may recharge the aquifers. (VWRA 4, pp. 2-4; SCWC 10, pp. 26-31, 40; SCWC 1, pp. 8-9; DFG 2, p. 1; R.T. pp. 129-133.) The flood-plane aquifer is recharged by the river during periods of storm runoff and discharges water to the river during non-storm periods.

Withdrawals from the flood-plane aquifer, primarily by groundwater pumping, reduce flows in the river either by causing water from the river to enter the aquifer, or by capturing groundwater that otherwise would have discharged to the river. (SCWC 1, pp. 9-10; SCWC 10, pp. 27, 35, 41-42.) Recharge to the aquifer occurs primarily in the upstream portion of the Alto Subarea. In the vicinity of the Lower Narrows, however, bedrock beneath the Mojave River channel rises to near the surface, obstructing groundwater flow, and resulting in the discharge of groundwater to the river channel which becomes base flow. (SCWC 3, p. 27; SCWC 10, p. 13.)

Over-pumping in the Alto Subarea has resulted in a decline in the natural discharge of groundwater at the Lower Narrows and a corresponding decline in base flows as measured at the Lower Narrows. (VWRA 4a, pp. 3-4; DFG 2, pp. 1-3; DFG 3, pp. 1, 3-4; R.T. pp. 235, 387-388, 697-698, 700-703.) Increased urbanization and the development of a regional sewer system have also contributed to the decline in base flows by redirecting return flows that otherwise would recharge the groundwater basin to VWRA's treatment plant. (DFG 2, p. 1; DFG 18; R.T. pp. 436-439.) Base flows as measured at the Lower Narrows have declined significantly over the last 15 years. The long-term average base flow for the period 1930-1990 is 21,000 cfs. (DFG 16, pp. 1-2; DFG 17.) (This is the basis for the Alto Subarea's obligation to

the Centro Subarea under the Mojave Adjudication.) By contrast, the 10-year running average for the period 1990-1999 is approximately 8,600 afa. (*Ibid.*)

In its closing brief, VVWRA argues that the source of the wastewater that it treats is foreign water because the Mojave River upstream of VVWRA's point of discharge is a wasting stream.

VVWRA asserts that its treated wastewater discharge is present in the river only because the water was previously extracted from the ground. VVWRA's argument ignores the fact that, while the river recharges the groundwater basin, groundwater also contributes directly to base flows in the river. VVWRA fails to recognize that the pumping of groundwater, a portion of which is ultimately delivered to VVWRA's treatment plant, is a major contributing factor in the decline in groundwater levels in the Alto Subarea, and that this decline in groundwater levels has led to a reduction in natural discharge of groundwater to the Mojave River.

5.0 THE TRANSFER WOULD INJURE WATER USERS IN THE ALTO SUBAREA WHO ARE PARTIES TO THE MOJAVE RIVER ADJUDICATION

As explained in sections 3 and 4, above, the no injury rule protects water right holders from any injury resulting from VVWRA's proposed decrease in the amount of treated wastewater discharged to the Mojave River because the source of the treated wastewater is groundwater that would under natural conditions reach the Mojave River.

Three participants in this proceeding, AVRWC, SCWC, and Jess Ranch, alleged that they would be injured by VVWRA's proposed transfer because they would have to pay increased make-up water assessments under the adjudication. AVRWC is a major groundwater diverter within the Alto Subarea, serving approximately 46,000 residents. (AVRWC 1, p. 1; VVWRA 1j, ex. B, sheet 7 of 26.) Jess Ranch is also a major groundwater diverter within the Alto Subarea. (VVWRA 1j, ex. B, sheet 9 of 26.) SCWC has groundwater pumping facilities located in both the Alto Subarea, servicing the Town of Apple Valley, and in the Centro Subarea, servicing the City of Barstow. For the reasons explained below, we find that reducing VVWRA's treated wastewater discharge by 1,680 afa will injure all of the water right holders in the Alto Subarea who are bound by the Mojave River Adjudication, including but not limited to AVRWC, SCWC, and Jess Ranch.

As stated earlier, the adjudication imposes a physical solution whereby Alto Subarea users must pay a make-up water assessment to the extent that they do not meet their obligation to maintain 23,000 afa of base and subsurface flows at the Lower Narrows. Since 1990, base flows and subsurface flows at the Lower Narrows, together with VVWRA's treated wastewater discharge, have exceeded 23,000 afa only once, in 1998. (DFG 18; VVWRA 3a, p. 5, Attachment 2; AVRWC 1, p. 3.)

The record indicates that base and subsurface flows and VVWRA's discharge will continue to fall short of 23,000 afa. As a result, Alto Subarea parties will continue to incur make-up water assessments. The 1,680 afa transfer would increase this burden on the parties. The transfer would result in an increased cost to all the Alto Subarea parties collectively of approximately \$320,880 a year. (VVWRA 3a, p. 5.) This cost could increase to \$449,000 in the near future, and could increase further if the cost of purchasing supplemental water increases in the future. (VVWRA 3a, pp.5-6; R.T. pp. 50-51.)

5.1 The "Economic" Injury to the Alto Subarea Parties Constitutes Injury within the Meaning of Water Code Section 1702

VVWRA does not dispute that the Alto Subarea parties would incur increased costs under the adjudication as a result of the transfer. (VVWRA 3a.) Rather, VVWRA argues that economic injury does not constitute injury within the meaning of Water Code section 1702. We disagree. The protection afforded to the Alto Subarea parties under section 1702 does not change merely because the adjudication imposed a physical solution.

The purpose of a physical solution is to assure the most efficient use of water, by providing senior right holders with the water supply to which they are entitled, without reducing the diversions of other water right holders by as much as would otherwise be required. (*City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 339-340 [60 P.2d 439, 449-450].) In this case, the physical solution protects water users in the Centro Subarea, while allowing water users in the Alto Subarea to maintain their current level of diversions. If the court had not imposed a physical solution in the Mojave Adjudication, the Alto Subarea parties would have been required to curtail their diversions to the extent necessary to maintain the flows needed to satisfy right holders in the Centro Subarea.

VVWRA does not deny that the Alto Subarea parties would be injured if the transfer required them to further curtail their diversions in order to satisfy downstream right holders. The fact that the Alto Subarea parties would be injured does not change just because, instead of requiring the parties to curtail their diversions, the physical solution requires the parties to pay increased make-up water assessments in order to buy supplemental water.⁸

5.2 Increased Treated Wastewater Discharges Will Not Mitigate the Injury to Third Party Water Right Holders

VVWRA also argues that third party water right holders and public trust resources would not be injured because the 1,680 afa transfer would be offset by increased discharges associated with increased deliveries of wastewater to VVWRA's treatment plant. As explained below, however, the record demonstrates that base flows in the river will actually decrease as the level of VVWRA's treated wastewater discharge increases.

VVWRA submitted evidence that the amount of treated wastewater discharged will increase at a rate that exceeds the rate of the proposed transfer. The transfer would be implemented gradually because plumbing has not been installed yet that would allow for the irrigation of landscaped areas other than the golf course at the SCLA. VVWRA estimates that it would be 10 years before the project was fully implemented. (VVWRA 1a, p. 8; R.T. p. 42.) During the same 10-year time frame, VVWRA projects that the amount of treated wastewater discharge will increase from 9,967 afa to 12,685 afa, even taking into account the 1,680 afa transfer. (*Ibid.*) (VVWRA Exhibit 1n shows the gradual implementation of VVWRA's project and expected increase in discharges to the Mojave River during the period 1999-2010.)

⁸ In practical effect this case is no different than a case where a water right holder deprived of its ability to divert from a stream would purchase imported water as an alternative supply. Whether the effect is characterized as a loss of water or an increased cost, the effect is to impose a burden on a legal user of water that is inconsistent with the no injury rule. In addition, VVWRA's interpretation of what constitutes injury within the meaning of section 1702 would create a disincentive to develop physical solutions whereby a junior right holder assumes a financial obligation, such as providing a substitute water supply to a senior right holder, instead of restricting the junior right holder's diversions. A junior right holder might be reluctant to assume a financial obligation if doing so would mean that the junior right holder's protection from injury was diminished. Creating a disincentive to developing physical solutions would run counter to the constitutional and statutory mandate that the water resources of the state be put to beneficial use to the maximum extent possible, and that the waste or unreasonable use of water be prevented. (See Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.)

The argument that the impact of the transfer can be mitigated by increased discharges fails to take into account the fact that at this time the increased discharges are expected to result from increased groundwater pumping in the Alto Subarea, which will result in a corresponding decrease in base flows in the river. The decrease in base flows likely will exceed the increase in treated wastewater discharge, resulting in a net reduction in flows in the transition zone.

A witness for VVWRA testified that the current source of water in the Alto Subarea is groundwater and that the projected increase in treated wastewater discharge will come from increased groundwater pumping in the Alto Subarea unless water is imported from the State Water Project. (RT. p. 386.) As discussed in section 4, above, over pumping in the Alto Subarea already has reduced groundwater levels, which has led to a corresponding decline in base flows as measured at the Lower Narrows. (DFG 2, pp. 1-3; DFG 3, pp. 1, 3-4; R.T. pp. 235, 387-388, 697-698, 700-703.) Increased urbanization and the development of VVWRA's treatment plant have contributed to this decline in base flows at the Lower Narrows by redirecting return flows that otherwise would recharge the groundwater basin to VVWRA's treatment plant. (DFG 2, p. 1; R.T. pp. 436-439.)

The record indicates that an increase in treated wastewater discharge that stems from an increase in groundwater pumping will lead to a further decline in base flows. One of DFG's expert witnesses analyzed the relationship between the increase in VVWRA's treated wastewater discharge and the decline in base flows. VVWRA's discharges have increased steadily since 1981, when VVWRA's treatment plant came on line. DFG's witness testified that for the period 1981-1999, the five-year running average increase in treated wastewater discharges was 500 afa, while the five-year running average decline in base flows measured at the Lower Narrows was 900 afa. (DFG 16, p. 2; R.T. p. 698.) This represents a decrease in base flows of 1.8 acre-feet for every acre-foot increase in treated wastewater discharge. In sum, if VVWRA's treated wastewater discharge increases as a result of increased groundwater pumping, flows in the transition zone can be expected to decline, not increase.

5.3 VVWRA's Argument that the Transfer Will Be Offset by Reduced Groundwater Pumping Is Not Supported by the Record

A number of witnesses for VVWRA contended that the transfer would not result in an increase in consumptive use, and therefore would not affect groundwater levels or flows in the Mojave River, because the transfer would be offset by a reduction in the amount of groundwater produced by the City of Adelanto, which currently supplies water to SCLA. (VVWRA 2a, pp. 2-3; VVWRA 4a, p. 4; VVWRA 7a, p. 13; VVWRA 1p; VVWRA 1q; R.T. pp. 394-398.) On cross-examination, however, the witnesses for VVWRA conceded that they did not know whether the City of Adelanto would reduce its groundwater pumping if the city ceased to supply water to SCLA, or if the city would simply use the water elsewhere. (R.T. pp. 175, 210-212; 284-285, 364-365; 418-422; see also R.T. p. 742.) We cannot conclude that the transfer will be offset by a reduction in groundwater pumping without some assurance that the City of Adelanto would in fact reduce its pumping. To the extent that the transfer would free up existing groundwater supplies for new uses, overall consumptive use of water will increase, further exacerbating groundwater overdraft in the Alto Subarea.⁹

6.0 CENTRO SUBAREA WATER USERS WILL BE PROTECTED FROM INJURY UNDER THE TERMS OF THE ADJUDICATION

SCWC contends that any reduction in the amount of treated wastewater that is discharged into the Mojave River in the transition zone will reduce the amount of base and storm flow that reaches the Centro Subarea, which will increase SCWC's pumping costs. (SCWC 1, pp. 1-2.) As stated earlier, SCWC supplies water to the City of Barstow. SCWC produces groundwater in the Centro Subarea and holds licenses to divert up to 7,200 afa of underflow from the Mojave River in the Centro Subarea. (SCWC 4.)

We find that none of the Centro Subarea users, including SCWC, would be injured by the proposed transfer, provided that the Alto Subarea parties comply with the terms of the

⁹ In addition, the record indicates that since 1992, when George Air Force Base closed, only about 400 afa of pumped groundwater has been used to irrigate the golf course at SCLA. (R.T. pp. 402-403.) Apparently, VVWRA assumes that the remaining areas at SCLA that VVWRA proposes to irrigate with treated wastewater otherwise would be irrigated with groundwater, even though those areas have not been irrigated for almost a decade. Contrary to this assumption, it is also possible that those areas never will be irrigated unless treated wastewater is available. It is questionable whether the transfer could be offset by a reduction in groundwater pumping that is not currently taking place, and might never take place.

adjudication. As stated earlier, the adjudication provides that Centro Subarea users, including SCWC, are entitled to average annual base and subsurface flows as measured at the Lower Narrows of 23,000 afa. The record indicates that base and subsurface flows together with VVWRA's discharge will continue to fall short of 23,000 afa. Any reduction in VVWRA's treated wastewater discharge will further reduce the amount of water available for Centro Subarea users. To the extent that base and subsurface flows fall short of 23,000 afa, however, Alto Subarea users will be required to pay a make-up water assessment, which will be used to purchase supplemental water in order to make Centro Subarea users whole. Accordingly, we conclude the Centro Subarea users would not be injured by the proposed transfer, provided that Alto Subarea parties comply with the terms of the adjudication.

7.0 THE TRANSFER COULD ADVERSELY AFFECT THE PUBLIC TRUST RESOURCES OF THE MOJAVE RIVER

The SWRCB must take into account the impacts to fish, wildlife, and other instream beneficial uses of the Mojave River in considering whether to approve VVWRA's change petition. As discussed below, approval of VVWRA's change petition has the potential to adversely affect riparian habitat below VVWRA's point of discharge, and numerous species, including threatened and endangered species, that rely on the riparian habitat. These impacts could be mitigated by the requirement that VVWRA maintain a certain level of treated wastewater discharge. But, as discussed in section 5.2, above, increased discharges probably will stem from increased groundwater pumping, which will in turn cause base flows in the river to drop. This could adversely affect riparian habitat upstream of VVWRA's point of discharge.

7.1 Legal Background

Preliminarily, VVWRA argues that Water Code sections 1700-1707 do not require the SWRCB to find that VVWRA's change petition will not adversely affect fish and wildlife before the SWRCB may approve the transfer. Although the provisions of the Water Code that govern both short- and long-term transfers require a finding that a given transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses (Wat. Code, §§ 1727, 1737), Water Code section 1702, which applies in this case, does not expressly require such a finding. As stated earlier, Water Code section 1702 requires only the finding that the proposed change "will not operate to the injury of any legal user of the water involved."

In past decisions, the SWRCB has suggested that fish, wildlife and other instream beneficial uses may constitute “legal users” of water within the meaning of section 1702, consistent with the public trust doctrine. (Order WR 95-9, p. 29, fn. 10; Order WR 98-01, p. 5, fn. 2.)¹⁰ The public trust doctrine protects public uses of navigable water bodies, including navigation, commerce, fishing, recreation, and the preservation of fish and wildlife habitat. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434-435 [658 P.2d 709, 189 Cal.Rptr. 346].)

In *National Audubon*, the seminal case on the California public trust doctrine, the California Supreme Court held that the public trust doctrine imposes upon the SWRCB a duty of continuing supervision over the appropriation and use of water. (*Id.* at pp. 446-447.) The Court held that, in addition to considering the public trust when acting on water right applications, the SWRCB may be required to reconsider the impacts of long-standing diversions on public trust uses in light of current knowledge or needs. (*Ibid.*) It follows that the SWRCB must consider the impacts to the public trust uses of the Mojave River in considering whether to approve VVWRA’s change petition. Assuming for the sake of argument that public trust uses do not constitute legal users of water within the meaning of Water Code section 1702, it would be inconsistent with the SWRCB’s public trust responsibility to approve a change that would have an unreasonable effect on public trust uses.¹¹ Under the public trust doctrine, the SWRCB must protect public trust uses, to the extent consistent with the public interest. (*Ibid.*)

7.2 General Description of the Riparian Habitat and Species That May Be Impacted

One of DFG’s witnesses testified that the riparian habitat downstream of VVWRA’s point of discharge is some of the most pristine habitat along the Mojave River. (R.T. pp. 452, 455-456.) Riparian habitat extends approximately six miles downstream of the VVWRA discharge point. (DFG 14, 15; R.T. pp. 304-305, 452-453.) According to a witness for DFG, more than

¹⁰ This does not mean that all changes that adversely affect instream beneficial uses are prohibited. The public trust doctrine calls for a balancing between public trust uses and competing uses.

¹¹ VVWRA argues that it is doubtful that the public trust doctrine applies in this case because the source of VVWRA’s treated wastewater discharge is groundwater, not “waters arising from the navigable servitude.” The applicability of the public trust doctrine, however, depends on whether a navigable water body will be affected by a diversion or other activity, and is not limited to cases involving direct diversions from navigable water bodies. (*National Audubon, supra*, 33 Cal.3d at pp. 436-437.)

100 species could be affected by the proposed reduction in treated wastewater discharge. (DFG 13.) Of these species, four are protected under the federal Endangered Species Act: Least Bell's Vireo, Southwestern Willow Flycatcher, Southwestern Arroyo Toad, and the California Red-legged Frog. In addition, six species are listed as threatened or endangered under the California Endangered Species Act: Least Bell's Vireo, Southwestern Willow Flycatcher, Western Yellow-billed Cuckoo, Southern Bald Eagle, Mojave Ground Squirrel and the Swainson's Hawk. Finally, eight of the species that may be affected are species of special concern: Summer Tanager, Yellow-breasted Chat, Brown-crested Flycatcher, Vermillion Flycatcher, Southwestern Pond Turtle, Yellow Warbler, Two-striped Garter Snake, and the Mojave River Vole.

Many of these species use riparian cottonwood and willow habitat for breeding, nesting, and foraging. Others use standing water habitat for basking and feeding. Other sensitive or protected species may exist in the surrounding area and use the riparian area incidentally.

7.3 Impacts of the Transfer on Riparian Habitat

A reduction in the volume of treated wastewater discharge would affect riparian habitat by reducing the length of surface flow downstream of the point of discharge and by reducing groundwater levels. These impacts would be avoided, and the riparian habitat below VVWRA's discharge point would be protected, if VVWRA's treated wastewater discharge increases as a result of increased groundwater pumping in the Alto Subarea. As explained in section 5.2, above, however, if this occurs base flows in the river can be expected to decline, not increase. Decreases in base flow could degrade habitat upstream of VVWRA's point of discharge. The upstream habitat does not enjoy the benefit of VVWRA's discharges. We cannot evaluate what impact a further decline in base flows might have, however, because the record contains very little information about the quality of habitat upstream of VVWRA's discharge point.¹²

¹² Witnesses for DFG and VVWRA focused on potential impacts to habitat downstream of the discharge point, and for the most part did not address potential upstream impacts.

7.4 Compliance with the Mojave River Adjudication Will Not Necessarily Protect Riparian Habitat in the Transition Zone

VVWRA argues that the riparian habitat in the transition zone will be protected by the requirement under the Mojave River Adjudication that 23,000 afa of base and subsurface flows be maintained as the Lower Narrows. VVWRA notes that the adjudication took public trust interests into account in formulating the physical solution. (VVWRA 1j, pp. 20-21, 24-25.) The judgment states generally that public trust resources were taken into account, but does not state specifically that maintaining 23,000 afa of base and subsurface flows at the Lower Narrows will ensure that public trust resources in the transition zone will be protected.

In addition, as explained earlier, the adjudication allows the parties to the adjudication to make up for any shortfall in their 23,000 afa obligation by purchasing imported water, or by purchasing a party's unused free production allowance. To the extent that the parties opt to make up any shortfall by buying unused free production allowance from water users in the Centro Subarea, compliance with the terms of the adjudication will not necessarily ensure that 23,000 afa of "wet" water will be maintained at the Lower Narrows. In sum, compliance with the adjudication will not necessarily ensure that riparian habitat in the transition zone will be protected.

7.5 Conclusion

In conclusion, even if the transfer were offset by an increase in treated wastewater discharges, a corresponding reduction in base flows could have a detrimental affect on the Mojave River and the species that rely on the river's riparian corridor. In light of the fact that we cannot approve the transfer because it would injure third party water right holders, we need not decide whether it would be in the public interest to approve the transfer, notwithstanding the fact that it would have indefinable impacts to public trust resources upstream of VVWRA's point of discharge.

8.0 FUTURE RECYCLED WATER PROJECTS ARE POSSIBLE PROVIDED THAT THE TRANSFER OF TREATED WASTEWATER IS OFFSET BY A REDUCTION IN GROUNDWATER PUMPING OR BY IMPORTED WATER

As discussed in section 5.3, VVWRA's assumption that its proposed transfer would be offset by a reduction in groundwater pumping is not supported by the record in this case. If the record had supported VVWRA's claim, however, VVWRA's transfer probably could have been approved. Moreover, VVWRA may be able to implement future reclamation projects, provided that the

transfer of treated wastewater is offset by a reduction in existing groundwater pumping, or by water imported from outside the Mojave River watershed.¹³

In either case, the proposed transfer would have to be evaluated to ensure that the amount of treated wastewater that would be consumptively used by the recipient of the treated wastewater would be fully offset by either the consumptive use savings associated with a reduction in groundwater pumping, or by the amount of new water to be imported into the system. The amount of water that is consumptively used is a function of the purpose of use, the climate, geology and other factors. The amount of water that would be consumptively used by the recipient of the transferred wastewater and the consumptive use savings associated with a concomitant reduction in groundwater pumping necessarily would be the same where treated wastewater simply replaces groundwater that is currently being used, provided the factors that affect consumptive use are unchanged. If, however, the treated wastewater would be put to a new use, and would be offset by a reduction in groundwater currently being used for a different purpose elsewhere in the basin, the amount of water that would be consumptively used and the consumptive use savings would not necessarily be the same. Any difference in unit consumptive use would have to be evaluated in determining whether the impacts of the transfer would be fully offset by a reduction in groundwater pumping.¹⁴

A reduction in groundwater pumping or the importation of water from outside the watershed that would ensure no net loss to the groundwater basin and river system as a whole could still result in unacceptable public trust impacts, depending on where groundwater pumping is reduced or

¹³ A witness for SCWC testified that a reduction in groundwater pumping by the City of Adelanto might not result in increased flows in the river due to the location of the city's wells. (R.T. pp. 720-721.) SCWC therefore questioned whether the impacts of VVWRA's proposed transfer to flows in the river could be offset by a reduction in groundwater pumping. It is true that under current conditions of groundwater overdraft in the Alto Subarea, a reduction in groundwater pumping by a given entity may not result in increased flows in the river. Such a reduction would, however, lessen the rate of decline in surface flows. (See DFG 2, p. 2; R.T. pp. 130, 436-439.)

¹⁴ In addition, a transfer would not be offset by any water that is imported, or unused free production allowance that is purchased, in order to satisfy the Alto Subarea's obligation under the adjudication to provide 23,000 afa to the Centro Subarea. Any such "supplemental water" would be earmarked for the purpose of satisfying the Alto Subarea obligation to Centro. Supplemental water purchased under the adjudication should not be double counted and treated as though it makes up for both a short-fall in meeting the 23,000 afa obligation and the impacts of a transfer. Similarly, if water is imported for others uses, and is not dedicated to groundwater recharge or supplementing flows in the Mojave River, then the imported water would not offset a transfer to the extent that the imported water is consumptively used.

imported water is delivered. For example, a reduction in groundwater pumping upstream of VVWRA's point of discharge might benefit any riparian habitat in the vicinity, but might not directly benefit the riparian habitat below VVWRA's point of discharge. As discussed in section 7.0, above, the record in this proceeding contains very little information about the quality of the riparian habitat upstream of VVWRA's point of discharge. In any future proceeding, the SWRCB would have to consider whether impacts to the riparian habitat below VVWRA's point of discharge would be fully mitigated by a reduction in groundwater pumping or the importation of water, and whether it would be in the public interest to approve the transfer even if the impacts would not be fully mitigated.

9.0 APPLICABILITY OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The California Environmental Quality Act does not apply in this case because we are disapproving VVWRA's proposed wastewater transfer project. (Pub. Resources Code, § 21080, subd. (b)(5).)

10.0 CONCLUSION

For the reasons discussed above, we conclude that VVWRA's proposed transfer would injure all of the water right holders in the Alto Subarea of the Mojave River watershed who are bound by the Mojave River Adjudication. In addition, the transfer could adversely affect the public trust resources of the Mojave River. Accordingly, VVWRA's petition is denied. As discussed more fully in section 8, above, VVWRA may be able to implement future recycled water projects, provided that impacts to third party water right holders are offset by a reduction in groundwater pumping or the importation of water from outside the watershed. In evaluating any such proposal, the SWRCB also would have to consider impacts to public trust resources.

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D R A F T

September 6, 2001

ORDER

IT IS HEREBY ORDERED THAT VVWRA's petition to change the point of discharge, place of use, and purpose of use of 1,680 afa of treated wastewater is denied.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 31, 2001.

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Clerk to the Board